No. 11801

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MINA BICKFORD,

Appellee.

Upon Appeal from the District Court of the United States for the District of Montana.

BRIEF OF APPELLEE

HARRISON J. FREEBOURN,
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Attorney for Appellee.

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ARGUMENT

On February 18, 1947, appellee, Minah Bickford, was charged by indictment, with having committed perjury on October 22, 1945. She was a gray-haired colored woman, a seventy-five dollar-a-month maid of all work, at 14 South Wyoming Street, in the heart of Butte, Montana.

On Friday, preceding the Monday on which appellee came to trial, District Judge, R. Lewis Brown, now deceased, and one of the best District Judges this District has had in the last forty years, called Mr. Pease, of counsel for appellant, and the writer, as counsel for ap-

pellee, to his office to discuss the allegations of the indictment, which he had been studying, preparatory to trial.

On Monday next, November 3, 1947, upon the opening of the trial, the motion to dismiss the indictment, as set out on page 5 of the Transcript of Record, was made. Then ensued the colloquy as appears on page 6 to and including 14 of the Transcript of Record.

The motion was good and the action of the Court proper. The indictment lacked a matter of substance and a necessary ingredient of the crime of perjury. It failed to aver or allege that the person administering the oath had authority to do so, as required by Section 558 of Title 18, U. S. Codes.

In Hill v. United States, 54 Fed. 2nd, p. 599, at page 602, the Court, after stating the indictment was bad, said:

> "Again, there is no averment that James Talty had competent authority to administer the purported oath, as appears in the affidavit supra.
>
> This averment seems to be a necessary one under the statute, which abbreviates the common law form of indictment for perjury and sets forth the substance of what it shall contain. U. S. Codes, title 18, sec. 558 (18 U. S. C. A. A. sec. 558)."

If Congress had intended that the "averring such court or person to have competent authority to administer the same" merely applied to Notaries, Commissioners and the like, it would have so stated. When it enacted such law, section 558, Title 18, U. S. Codes, it had in mind that part of Article III, section 1, of our Constitution which is as follows:

> "The judicial power of the United States shall be vested in one supreme court, and such inferior courts as the Congress may from time to time ordain and establish."

It had in mind one of those inferior courts, the district courts. If then, under the statute, it was necessary to aver the authority of the court to administer the oath, why should not such authority be necessary to aver when the clerk of such court administered the oath?

To constitute perjury or false swearing under the laws of the United States, it must appear that the officer administering the oath was authorized to do so by the laws of the United States.

U. S. v. Curtis, 107 U. S. 671, 2 S. Ct. 507, 27 L. Ed. 534.

A crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged.

Anderson v. U. S. (C. C. A. N. Y. 1923) 294 F. 593;

U. S. v. Geare (1923) 293 Fed. 997, 54 App. D. C. 30;

Moens v. U. S. (App. D. C. 1920) 267 F. 317;

Reeder v. U. S. (C. C. A. Okl. 1919) 262 F. 36, certiorari denied (1920) 40 S. Ct. 346, 252 U. S. 581, 64 L. Ed. 726.

An indictment for perjury is governed by the rule that the facts material to be charged must be stated clearly and explicitly.

Kovoloff v. U. S. (Ill. 1912) 202 F. 475, 120 C. C. A. 605, certiorari denied (1912) 33 S. Ct. 217, 226 U. S. 609, 57 L. Ed. 380.

An indictment for perjury that does not set forth the substance of the offense does not authorize judgment on a verdict of guilty.

> Markham v. U. S. (1895) 16 S. Ct. 288, 160 U. S. 319, 40 L. Ed. 441;
>
> Bartlett v. U. S. (Mont. 1901) 106 F. 884, 46 C. C. A. 19.

Counsel for appellant says that the absence of this averment does not prejudice appellee and under section 556, Title 18, U. S. Codes (appellant's brief, p. 23) the indictment is sufficient. Since the missing averment is one of substance, section 556 does not justify its omission. This section is only applicable where the only defect is that some element of the offense is stated loosely and without technical accuracy.

> Harper v. U. S. (1909) 170 F. 385, 95 C. C. A. 555;
>
> Horn v. U. S. (Mo. 1910) 182 F. 721, 105 C. C. A. 163, writ of certiorari denied (1911) 31 S. Ct. 470, 219 U. S. 585, 55 L. Ed. 347.

Naturally the defendant or appellee is gravely injured if denied the right to rely upon the omission of the averment of authority either as a matter of fact or of law. You might as well say that a defendant cannot be prejudiced by leaving out the name of the court, the date of the alleged offense, or the statement of the false oath, since she was present in the court, knew the date when it occurred, and knew the facts stated falsely.

There is no conflict between section 558 and section 7(c), Rules of Criminal Procedure (appellant's brief, p. 24). Both call for a plain, concise and definite statement

of essential facts. The authority to administer the oath can be alleged in no plainer, more concise and definite manner, than as set out in section 558.

Many of the cases cited by appellant are not in point. Nor can counsel for appellant take much satisfaction from Barnard v. United States, 162 Fed. 618 (appellant's brief, p. 5) since a reading of that case, page 622, clearly shows that the statute then, section 5392, was not as now, section 558, and the amendments made showing that Congress required a clear, definite statement and averment of the authority of the person to administer the oath.

We believe Judge Brown's decision should be affirmed and this appeal denied.

Respectfully submitted,

HARRISON J. FREEBOURN,

Attorney for Appellee.